Supreme Court, U.S.
FILED
JAN 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-1085

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ESTATE OF ANDERSON WILLIS, ET AL.,
Petitioners,

v.

ESTATE OF JOHN RILEY, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT DOW CHEMICAL COMPANY'S BRIEF IN OPPOSITION

CHRISTOPHER E. HOWE
A. L. DENT III*
FULBRIGHT & JAWORSKI
1301 McKinney Street
Houston, Texas 77010
(713) 651-5151
Attorneys for the Respondent Dow Chemical Company
* Counsel of Record

Date: January 27, 1989

Alpha Law Brief Co., Inc. — 8748 Westpark — Houston, Texas 77063 — 789-2000

12 pp

QUESTION PRESENTED

WHETHER THE COURTS BELOW CORRECTLY DECIDED THE FACTS WHEN THEY HELD THAT THE PETITIONERS' EQUITABLE TOLLING ARGUMENT FAILED SINCE THE PETITIONERS KNEW OF AND COULD HAVE SUED ON THEIR CAUSES OF ACTION AT LEAST TWO YEARS BEFORE THEY FILED SUIT.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	I
TABLE OF CONTENTS	II
TABLE OF AUTHORITIES	III
STATEMENT OF THE CASE	2
ARGUMENT	4
CONCLUSION	7
CERTIFICATE OF SERVICE	8

TABLE OF AUTHORITIES

CASES	Page
General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175 (1938)	4
Hohri v. United States, 586 F. Supp. 769 (D.D.C. 1984), *rev'd.*, 782 F.2d 227 (D.C. Cir. 1986), *petition for rehearing denied*, 793 F.2d 304 (D.C. Cir. 1986), *vacated*, ____U.S.____, 107 S.Ct. 2246 (1987)	5, 6
United States v. Johnson, 268 U.S. 220 (1925)	4
Wilson v. Iseminger, 185 U.S. 55 (1902)	7
Wood v. Carpenter, 101 U.S. (11 Otto) 135 (1879)	6
STATUTES	
42 U.S.C. § 1981	3
42 U.S.C. § 1982	3
42 U.S.C. § 1983	3
42 U.S.C. § 1985(3)	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NO. 88-1085

ESTATE OF ANDERSON WILLIS, ET AL.,
Petitioners,

v.

ESTATE OF JOHN RILEY, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

RESPONDENT DOW CHEMICAL COMPANY'S BRIEF IN OPPOSITION

On December 27, 1988, the petitioners, including the Estate of Anderson Willis, filed a petition with this Court for a Writ of Certiorari to the Court of Appeals for the Fifth Circuit. The petitioners seek review of that court's decision in *Estate of Anderson Willis, et al. v. Estate of John Riley, et al.*, No. 87-1660 (5th Cir. August 25, 1988). This Brief is submitted by the respondent Dow

Chemical Company ("Dow").[1] Dow urges that this Court refuse this petition because this case involves settled law. This Court, if it accepted the writ of certiorari, would merely be reviewing facts amply supported by the record and already determined by two courts. No important legal issues would be addressed.

STATEMENT OF THE CASE

The petitioners seek redress for what they describe as the misappropriation of thousands of acres of land belonging to their long dead ancestor, Anderson Willis. Willis allegedly bought nearly three thousand acres of land in Freestone County, Texas in 1868. From that date until around 1904, various whites in Freestone County allegedly stole land from Willis. None of these wrongdoers are specifically identified, however.

---

1. Dow has the following subsidiaries and affiliate organizations of which it owns less than 100%: Alamo Land Company, Inc.; Arabian Chemical Company; CD Medical, SRL; Compagnie des Services Dowell Schlumberger; DCU/LB TRUST; Cromarty Petroleum Company Limited; Scotdril Offshore Company; Chirntrade; Vorakim Kimya Sanay Ve Ticaret A.S.; Transformadora de Etileno S.A.; MT Partnership; Dowell Schlumberger Canada Inc.; Fort Saskatchewan Ethylene Storage Limited Partnership; H-D Tech, Inc.; Wabiskaw Explorations Ltd.; Chief Shipping Company; Hager and Kaessner Limited; Viopol S.A.; Oronzio de Nora Technologies S.p.A.; Dow Corning Corporation; Dowell Schlumberger Corporation; Dowell Schlumberger Incorporated; El Dorado Terminals Company; Insul/Crete Company, Inc.; ISOPOR - Companhia Portugesa de Isociantos Ltda.; Ivon Watkins-Dow Limited; Joliet Marine Terminal Trust Estate; M.D. Kasei Limited; Funai Pharmaceuticals Company Ltd.; First Chemical Factoring S.p.A.; Laboratories Industriales Farmaceuticos Ecuatorianos (L.I.F.E.); MDP (Holdings) Ltd.; Metal Mark Inc.; Oronzio de Nora Impianti Electrochimici S.A., Lugano; Oronzio de Nora Technologies B.V.; Oronzio de Nora Technologies S.p.A.; P.T. Pacific Chemicals Indonesia; Pacific Chemicals Berhad; Pacific Plastics (Thailand) Limited; Petroquimica-Dow S.A.; Eurosemences, S.A.; Vorakim Kimya Sanayi Ve Ticaret A.S.; Zip Pak Incorporated; The Cynorn Company; Fort Saskatchewan Ethylene Storage Corp.

The petitioners brought suit on June 19, 1984. The petitioners asserted both state law and federal constitutional claims, including claims brought under 42 U.S.C. §§ 1981, 1982, 1983 and 1985(3). Because these causes of action unequivocally arose around or before 1900, the main issue below concerned Texas' two year statute of limitations applicable in federal civil rights cases. To excuse the nearly one hundred year delay in bringing suit, the petitioners primarily claimed that they did not have access to the courthouse (¶ 17 of the Plaintiffs' First Amended Complaint, Appendix F to the Petition for Writ of Certiorari). This, claimed the petitioners, operated to equitably toll the two year statute of limitations.

Tu support this allegation, the petitioners offered that "the [Ku Klux] Klan and their system" barred such access (¶ 66a of the Plaintiffs' First Amended Complaint, Appendix F to the Petition for Writ of Certiorari). Also, they claimed that they were never successful in obtaining an attorney "who recognized the nature of their claim" (¶ 68 of the Plaintiffs' First Amended Original Complaint, Appendix F to the Petition for Writ of Certiorari).

However, the petitioners never presented any specific proof of this. Moreover, as the courts below recognized, their own Complaint conceded that any judicial access problems were alleviated after 1968 (¶ 44A of the Plaintiffs' First Amended Complaint, Appendix F to the Petition for Writ of Certiorari). Because the petitioners could not excuse their nearly one century delay in filing suit, the district court granted summary judgment in favor of the respondents. The district court also found that the respondents did not cause any of the alleged deprivations, and so granted judgment on that ground also. The Court of Appeals for the Fifth Circuit in a *per curiam* opinion

affirmed the district court's statute of limitations holding. The appellate opinion was not published, since the court found the law and the facts of the case to be well settled. The petitioners, however, still continue to press their claims.

ARGUMENT

This case concerns a narrow and uncomplicated legal issue: do any facts in the record support the contention that the statute of limitations should be equitably tolled for approximately one hundred years. The court below applied mostly undisputed facts to the law of equitable tolling, and found the petitioners' claims were extinguished at the latest in 1970, fourteen years before this suit was filed.

This case, therefore, does not present a disputed legal issue. The petitioners do not quarrel with the courts' analysis of equitable tolling principles under Texas law. Nor do the petitioners dispute the constitutionality of the particular statute of limitations applied in this case. Rather, the petitioners merely attack the propriety of granting summary judgment (*see* the Petition for Writ of Certiorari at pp. 13, 16, 19, and 20).

The petitioners' difference of opinion with the courts below about the facts does not provide a reason for granting certiorari. This Court has oft repeated that "[w]e do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson,* 268 U.S. 220, 227 (1925); *see also General Talking Pictures Corp. v. Western Electric Co.,* 304 U.S. 175, 178 (1938). Certiorari here, therefore, should be accordingly denied.

Besides their primary difference with the lower courts over the resolution of the factual record, the petitioners also argue that a significant issue of federal law exists. In so arguing, however, the petitioners obscure the only legal issue presented in this case: whether the statute of limitations should be tolled. While the petitioners' substantive claims would have had some importance if pursued in 1870 or 1900 or perhaps even in 1965, the substantive claims are not at issue here.

Nor does it aid the petitioners' argument to cite *Hohri v. United States,* ____U.S.____, 107 S.Ct. 2246 (1987). This Court, in granting certiorari in that case, did so primarily because "of the importance of the jurisdictional question . . .". *Id.* at 2249. Presumably, this Court therefore did not intend to reach the statute of limitations issue presented in that case.

In any event, the District of Columbia Circuit's opinion makes clear that the court decided the statute of limitations issue based on that case's unique facts. *Hohri v. United States,* 782 F.2d 227 (D.C. Cir. 1986). Indeed, the court described the facts there as "*sui generis.*" *Id.* at 249. After analyzing those facts, the court held the plaintiffs' Takings Clause claim was tolled. *Id.* at 253. However, the court also held that the plaintiffs' contract claims were not so tolled. *Id.* at 254.

These were close factual determinations as evidenced by the conflicting rulings on the limitations issue. Thus, the district court had ruled that the limitations period was not tolled for any of the plaintiffs' claims. *Hohri v. United States,* 586 F. Supp. 769 (D.D.C. 1984). While the majority in the court of appeals held that only the Takings

Clause claim was tolled, 782 F.2d 227, 253, the dissent would have rejected even that argument. 782 F.2d 227, 260-262 (Markey, C.J., dissenting). Five judges of the District of Columbia Circuit then disagreed with the majority's opinion when considering the plaintiffs' petition for rehearing *en banc*. *Hohri v. United States,* 793 F.2d 304, 304-313 (D.C. Cir. 1986) (Bork, J., dissenting from denial of petition for rehearing *en banc*).

Here and by marked contrast, the Fifth Circuit in a *per curiam* and unpublished opinion affirmed the district court's factual findings. Therefore, unlike in *Hohri* this Court would not only be reviewing a narrow factual issue, but a clear cut factual issue as well. Such a review would illuminate no important question of federal law.

A final reason supports the conclusion that certiorari should not be granted in this case. If this court were to reexamine the factual findings undergirding the lower courts' statute of limitations ruling, thousands of stale claims would be resucitated. Decades old disputes would flood the courts. To successfully argue for tolling limitation periods, the claimants in those cases would need only vaguely allege that fear and ignorance impaired their ability to sue.

Such a result would create profound confusion. The result would also run counter to this Court's precedence which requires that parties claiming equitable estoppel specifically plead how the concealment was effected and how the concealment came to an end. *Wood v. Carpenter,* 101 U.S. (11 Otto) 135, 140 (1879). "A general allegation of ignorance at one time and of knowledge at another are of no effect." *Id.*

Such a result would also effectively gut the policy of repose inherent in statutes of limitations. This result especially should not be countenanced for "every government is under obligation to its citizens to afford them all needful legal remedies; but it is not bound to keep its courts open indefinitely for one who neglects or refuses to apply for redress until it may fairly be presumed that the means by which the other party might disprove his claim are lost in a lapse of time." *Wilson v. Iseminger,* 185 U.S. 55, 62 (1902).

CONCLUSION

For all the above reasons, the respondent Dow respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

CHRISTOPHER E. HOWE
A. L. DENT III*

FULBRIGHT & JAWORSKI
1301 McKinney Street
Houston, Texas 77010
(713) 651-5151

Attorneys for the Respondent Dow Chemical Company

* Counsel of Record

Date: January 27, 1989

CERTIFICATE OF SERVICE

I, A. L. Dent III, Counsel of Record for Dow Chemical Company, do hereby certify that pursuant to Rules 28.3 and 28.5(b) of the Rules of the Supreme Court of the United States, true and correct copies of the foregoing Brief in Opposition were served upon the following individuals on this the 27th day of January, 1989, by placing same in the United States mail, certified, return receipt requested, postage prepaid.

Mr. Donald W. Hill
Hill, Hicks, Collins
One Main Place
1201 Main Street, Suite 1530
Dallas, Texas 75250

Mr. Frank D. McCown
Fort Worth Club Tower
Penthouse I. Suite A
Fort Worth, Texas 76102-4971

Mr. Herbert S. Bristow
Haley, Davis, Wren, Bristow
& Rasner, P.C.
310 United Bank Plaza
Waco, Texas 76710

Mr. W. A. Keils
Keils & Fulcher
P. O. Box 600
Teague, Texas 75860



A. L. DENT III